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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ANTHANASIOS LIVADITIS, also known as TOM D'OR,

Petitioner,

v.

MARILUZ ROSARIO, TERESA SHAPIAMA, LIGNY CANET, DOLORES MALDONADO, CARMEN ORTIZ, SHEILA BENTON, CHARLIE LOWE, MILAGRO PEREZ, MYRNA GARCIA, DANIEL BARBA, ALTAGRACIA LOPEZ and JOYCE E. WALKER, individually and on behalf of all others similarly situated,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether a defendant in an action in the district court was unconstitutionally denied his right to a jury trial where the appellate court may have abused its discretion in allowing the plaintiffs to conform the pleadings to the proof and add the defendant to a count in which he was not named and on which no evidence from the record was either produced or referred to.

II.

Whether the appellate court erred in allowing the plaintiffs to alter and amend a judgment through either Fed. R. Civ. P. 59(e) or 60(a) or (b) long after the time for such action had expired.

III.

Whether the plaintiffs had the proper standing to invoke court authority and assistance to enforce a judgment against a defendant who was not named in the count of the complaint upon which plaintiffs sought enforcement.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner Anthanasios Livaditis respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled proceeding on May 13, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 963 F.2d 1013 (7th Cir. 1992) and is printed in Appendix A. The judgment of the United States District Court, Northern District of Illinois, is printed in Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit (Appendix A) was entered on May 13, 1992. A timely petition for rehearing was denied on July 7, 1992 (Appendix B). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

United States Constitution, Amendment VII:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Statutes

Federal Rule of Civil Procedure Rule 6(b):

> Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (1) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them.

Federal Rule of Civil Procedure 15(b):

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise the issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not effect the result of the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defer upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Federal Rule of Civil Procedure 59(e):

> A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Federal Rule of Civil Procedure 60(a):

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Federal Rule of Civil Procedure 60(b):

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF CASE

Anthanasios Livaditis (a/k/a Tom D'Or) ("Livaditis") owned and operated two beauty schools, known as the D'Or Beauty College and the D'Or School of Cosmetology.[1] In 1987, fourteen hundred and four students brought a class action against the two schools and against Livaditis ("Defendants"). The Class Plaintiffs ("Plaintiffs") alleged that the Defendants violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(a), (c); the Illinois Consumer Fraud Act ("CFA"), Ill. Rev. Stat. Ch. 121½, ¶ 262; and committed common law breach of contract. The jury trial began on August 7, 1989, and concluded when the jury rendered its verdict on August 25, 1989.

On the Class Plaintiffs' Fourth Amended Complaint, the jury found against the two defendant schools on two Federal RICO counts (Counts I and II; against the Class Plaintiffs on one RICO count (Count IV) and on the breach of contract claim (Counts IV, V); and for the Class Plaintiffs on the pending Illinois Consumer Fraud Count (Count VI). Damages in excess of $600,000 were awarded only against the two corporate Defendants only on the consumer fraud count, a count in which Livaditis was not named defendant. The district court awarded attorney's fees later. After the trial, the Class Plaintiffs sought to execute the judgment against both the corporate Defendants, who had been identified in Count VI of the Complaint and also against Livaditis who had not been named in either the count or in the verdict.

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[1] D'Or Beauty College and D'Or School of Cosmetology were co-defendants with Anthanasios Livaditis in the District Court case. They have not petitioned to this Court.

On May 10, 1990, as a result of the Class Plaintiffs' judgment and their attempts to execute on him individually, Livaditis was forced to file a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code.

In February, 1992, Livaditis' bankruptcy attorneys discovered that Livaditis was not named in Count VI of the Fourth Amended Complaint, which was the only count on which the jury awarded damages. Prior counsel to Livaditis, including his trial, appellate and former bankruptcy attorneys, had not raised this point. On March 11, 1992, his present bankruptcy attorneys filed a "Motion for Leave to File Additional Appearance" and a "Motion to Vacate Judgment and Attorneys' Fees Award Against the Defendant Anthanasios Livaditis." Livaditis' bankruptcy attorneys contended then and continue to contend that there is no judgment against Livaditis, because he is not named in the one count where damages were assessed. Count VI of the Complaint names only the two corporate defendants and not Livaditis (in any capacity): "In this Count, Plaintiffs sue D'Or School and D'Or Beauty for actual and punitive damages an [sic] reasonable attorney's fees under the Illinois Consumer Fraud Act, Ill. Rev. Stat. Ch. 121½, § 261 et seq" (¶ 68 of Fourth Amended Complaint).

The verdict returned by the jury had three forms. Choice A stated, "We, the jury, find for the Plaintiffs and against all the Defendants. We assess actual damages in the sum of $_____ and punitive damages in the sum of $_____." Choice B allowed the jury to find in favor of the Plaintiffs and against certain Defendants, while in favor of other Defendants and Choice C allowed the jury to find in favor of all the Defendants and against the Plaintiffs. On August 25, 1987, the jury selected Choice A.

The District Court judgment recited the language of the verdict form selected by the jury: "[O]n plaintiffs' Illinois Consumer Fraud Act Count VI, judgment is entered for the plaintiffs and against all of the defendants and assess actual damages in the sum of $640,224.00 and punitive damages in the sum of zero." Thus, the court entered judgment on a verdict which tracked Count VI and which excluded Livaditis as a defendant.

REASONS FOR GRANTING WRIT

I.

WHETHER A DEFENDANT IN AN ACTION IN THE DISTRICT COURT WAS UNCONSTITUTIONALLY DENIED HIS RIGHT TO A JURY TRIAL WHERE THE APPELLATE COURT MAY HAVE ABUSED ITS DISCRETION IN ALLOWING THE PLAINTIFFS TO CONFORM THE PLEADINGS TO THE PROOF AND ADD THE DEFENDANT TO A COUNT IN WHICH HE WAS NOT NAMED AND ON WHICH NO EVIDENCE FROM THE RECORD WAS EITHER PRODUCED OR REFERRED TO.

The Seventh Circuit's holding in footnote 4 of their opinion *Mariluz Rosario, et al. v. Livaditis, et al.*, 963 F.2d 1013, 1022 (7th Cir. 1992), brings that court into conflict with the decision of this Court in *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 359 (1962), in which this Court held that the Seventh Amendment mandated that a jury verdict may not be reexamined by any court of the United States other than in conformity with the rules of the common law. The decision at bar also conflicts with the Seventh Circuit's own authority that holds that a party making an affirmative averment bears the burden of proving his contention. *Bauer v. Clark*, 161 F.2d 397, 400 (7th Cir. 1947). The Seventh Circuit's decision relieved the Class Plaintiffs of the burden of sustaining

their claim that an unnamed defendant could be deemed liable for damages although named in neither the count nor the verdict or the judgment.

The plaintiffs and the lower courts have violated defendant's constitutional right to a trial by jury by contorting Federal Rule of Civil Procedure 15(b) to allegedly conform the pleadings to the proof. Their behavior conflicts with both the express language of 15(b) and the law interpreting 15(b). The District Court and the Seventh Circuit violated Livaditis' right to a jury trial on the issue of his liability when they allowed Livaditis to be found liable as a defendant in a count of the complaint from which he was expressly excluded. The Seventh Circuit finally allowed this emendation long after the trial had taken place.

The purpose of Rule 15(b) is to allow the pleadings to be brought in line with the issues actually litigated in the trial court. *Maruska v. Maruska*, 155 F.2d 302, 303 (7th Cir. 1946). A court may refuse to allow a motion to conform the pleadings to the proof where the proof consists of speculation and conjecture. No authority exists to add an unnamed party defendant to a count after a verdict and judgment, all of which excluded that party. *Sleek v. J.C. Penney Co.*, 324 F.2d 467, 470 (3rd Cir. 1963) (applying Pennsylvania law). In the case at bar, neither the Plaintiffs nor the lower courts made specific reference to any evidence in the record which established their contentions that the jury meant to hold Livaditis liable. The party which makes an affirmative contention about an issue bears the burden of proving its contention. *Bauer v. Clark*, 161 F.2d 397, 400 (7th Cir. 1947) (declaratory judgment action). In this case, the Plaintiffs contend that the evidence shows that Livaditis is liable under the consumer fraud count. However, they have never provided the proof;

they have only provided general, non-specific, and conclusory allegations. The Plaintiffs have failed to provide any factual or legal authority to meet the threshold question of its right to amend a verdict and a judgment after each was entered.

Plaintiffs' complete failure to provide any concrete citations to the record which even remotely suggest either the location in the transcript or the nature of the evidence on which they rely left the lower courts in the position of both speculating about the grounds on which the jury based its verdict and arbitrarily assuming facts to find Livaditis liable on a count in which he was not named.

It is important to remember that Plaintiffs failed to add Livaditis into Count VI through four amendments of the complaint; that they failed to add him into the "aggregate" choice of the jury verdict form (the "all the defendants" choice); or into the judgment order of the district court; or into the appeal to the Seventh Circuit. They failed to add him until Livaditis' bankruptcy counsel attempted to point out that Livaditis was not liable because he was not charged in Count VI.

The Plaintiffs incorrectly ask the Court of Appeals to make a redetermination of the judgment and include in a jury verdict returned on a specific count of a complaint a defendant not charged in the complaint and not found liable in the verdict. However, Livaditis has found settled authority analogous to his circumstances which arise from inconsistent special verdicts and answers to interrogatories propounded to the jury. The cases suggest the plaintiffs cannot do this, and more importantly, that the courts cannot assist them by searching for a view of a verdict with internal inconsistencies which causes the verdict to become inconsistent with the facts of the case. The Supreme Court,

speaking through Justice Douglas, held in *Atlantic & Gulf Stevedore v. Ellerman Lines*, 369 U.S. 355, 359 (1962):

> "Neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' "

The Court further held at page 364 that:

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment."

Citing *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360, *Dick v. New York Life Insurance Co.*, 359 U.S. 437, 446.

In *Twin Disc, Inc. v. Big Bud Tractor*, 772 F.2d 1329, 1338 (7th Cir. 1985), Judge Flaum writing for the Seventh Circuit and relying on *Atlantic & Gulf Stevedores*, *supra*, held that "[W]hen it appears that there are verdict inconsistencies in a jury's verdict we are required on appeal to attempt to resolve the inconsistencies." In the case at bar it is the Plaintiffs who demand that this Court search for the one possible view of the case that will make the jury's verdict inconsistent.

The Fifth Circuit, in addressing a special verdict containing 28 separate interrogatories that had apparent conflicts, held in *Griffin v. Matherene*, 471 F.2d 911, 915 (5th Cir. 1973):

> "Entry of judgment upon a jury's special verdict with written findings of fact is subject not only to prece-

> dential guidelines but to a constitutional restraint as well. The Seventh Amendment requires that if there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly. *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 364 (1962). This court has stated that the test to be applied in reconciling apparent conflicts between the jury's answers is whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted, even though the form of the issue or alternative selective answers prescribed by the judge may have been the likely cause of the difficulty and largely produced the apparent conflict. *R. B. Company v. Aetna Insurance Company*, 299 F.2d 753, 760 (5th Cir. 1962). If on review of the district court's judgment we find that there is no view of the case which makes the jury's answers consistent and that the inconsistency is such that the special verdict will support neither the judgment entered below nor any other judgment, then the judgment must be reversed and the cause remanded for trial anew. *Missouri Pacific Ry. Co. v. Salazar*, 254 F.2d 847, 849 (5th Cir. 1958); *Wright v. Kroeger Corporation*, 422 F.2d 176, 178-179 (5th Cir. 1970)."

However, in the case at bar, the verdict can be and should be read consistently to include only the two corporate defendants, the only parties against whom relief was sought: The judgment recites "all the defendants" without naming them, and the jury verdict form names "all the defendants" without naming them individually. To enforce the judgment, one would have to go back to the Fourth Amended Complaint, Count VI, to identify "all the defendants." The Complaint named only the corporate defendants. The Plaintiffs incorrectly tried to amend when Livaditis pointed out their errors.

II.

WHETHER THE APPELLATE COURT ERRED IN ALLOWING THE PLAINTIFFS TO ALTER AND AMEND A JUDGMENT THROUGH EITHER FED. R. CIV. P. 59(e) OR 60(a) OR (b) LONG AFTER THE TIME FOR SUCH ACTION HAD EXPIRED.

Plaintiffs seek to alter or amend the judgment entered on the verdict to hold liable someone who was not charged in the count and against whom no verdict was returned or judgment entered. Federal Rule of Civil Procedure ("Rule") 59(e) requires that "[A] motion to alter or amend the judgment shall be served not later than 10 days after the entry of the judgment." Rule 6(b) specifically precludes any enlargement of time for taking action under Rule 59(e) other than as is set forth in Rule 59(e) itself. In the case at bar no action was ever instituted under 59(e) to amend the judgment.

Rule 60(a), which provides for the correction of clerical mistakes in judgments, is not urged by the Plaintiffs. The Plaintiffs do not suggest that the absence of Livaditis from Count VI entirely, the failure to name him in the verdict or in the judgment are clerical errors that could be corrected by resorting to Rule 60(a). On all other counts, where Livaditis was in fact named as a charged party, he was found not guilty by the jury. In essence, the Plaintiffs are attempting to raise substantive and not clerical issues as to why the judgment should be amended.

Rule 60(b) addresses relief from judgment on substantive ground. However 60(b) (1), (2), and (3), which govern mistake, newly discovered evidence and fraud, are time barred in this cause because motions for relief from the judgment must be brought no later than one year after entry of the judgment.

The Seventh Circuit in *Western Transp. Co. v. E.I Du Pont De Nemours and Company*, 682 F.2d 1227, 1236 (7th Cir. 1982) spoke to the issue of a motion brought by a prevailing Plaintiff, who sought to increase an award within a year after the entry of the judgment. Neither Plaintiff's counsel nor Plaintiff's expert found the error until nearly 16 months after the filing of the complaint. Judge Posner speaking for the Seventh Circuit stated:

> ". . . Western's attorneys inexplicably had failed to check the consultant's damage calculation. [In] these circumstances it was well within the District Court's discretion to decline to increase the judgment. In fact it would probably have been an abuse of his discretion to have granted the motion. A negligent mistake, that is one evincing a lack of due care, is not a proper ground for relief under Rule 60(b). *Bershad v. McDonough*, 486 F.2d 1333, 1337 (7th Cir. 1972). What is due care depends on the cost of an increment of care in relation to its expected benefits. If Western's consultant or attorneys had spent just a few more hours checking their computations before the complaint was filed, or at least before judgment was entered, rather than waiting till after judgment was entered to do so, they would have been able to increase the judgment by more than $27,000 (adding together the $23,000 and the $4,000 errors). It would have cost no more to check earlier than later. Western's mistake was careless and bars relief under Rule 60(b). From this it should also be clear that even if Western's aborted Rule 59(e) motion were treated as a rule 60(b) motion, the denial of relief from the $4,000 error would still have been proper."

The reach of Rule 60(b)(6) was defined by Judge Grady in *United States v. McDonald*, 86 F.R.D. 208, 208 (N.D. Ill. 1980) in the following language: "A claim is cognizable under Rule 60(b)(6) where there is evidence of extraordinary circumstances. *Klapprott v. United States*, 335 U.S.

601, 613 (1949) [extraordinary circumstances found where defense could not be imposed in immigration case because defendant was imprisoned]" (citations omitted). In the case at bar, the Plaintiffs not only fail to allege any extraordinary circumstances which would justify any relief under 60(b)(6), but they fail to allege any facts at all which would justify the relief sought.

Plaintiffs contended in the lower courts that Livaditis appeared and thus the court obtained jurisdiction over him, a matter not in dispute. The Plaintiffs invoked the jurisdiction of the court in clearly defined counts which identified with particularity the defendants charged. However, the Plaintiffs consciously excluded Livaditis from Count VI. The jury returned a number of specific verdicts, each consistent with the relief sought in each count and in conformity with the court's instructions The court's judgment on those verdicts are in like manner consistent with and supported by the verdicts. The Plaintiffs consciously chose not to seek the court's jurisdiction over Livaditis in Count VI. No issues were joined between Livaditis and the Plaintiffs on Count VI.

The Plaintiffs contend that Livaditis expressly consented to be tried on Count VI by virtue of the pretrial order, but the pretrial order does not support this reading. What is clear from the pretrial order is that the parties carefully differentiated between the individual defendant and the corporate defendants in all counts, except in Count VI where there is only a reference to the "defendants". The proposed verdict form for Count VI erroneously listed Livaditis, but the count itself excluded him. Plaintiffs also contend, without citation to the record, that Livaditis did not object at trial to evidence presented which pertained to him on Count VI. Since Plaintiff chose not to join Livaditis in Count VI, no legal or factual issues were joined

between Livaditis and the Plaintiffs on this count, and there would have been no need for him to object. However, it is noteworthy that at no point do the Plaintiffs make specific reference to evidence adduced on Count VI that applied to Livaditis alone and not to the corporate defendants and Livaditis as officer of the corporations.

III.

WHETHER THE PLAINTIFFS HAD THE PROPER STANDING TO INVOKE COURT AUTHORITY AND ASSISTANCE TO ENFORCE A JUDGMENT AGAINST A DEFENDANT WHO WAS NOT NAMED IN THE COUNT OF THE COMPLAINT UPON WHICH PLAINTIFFS SOUGHT ENFORCEMENT.

The Plaintiffs have not sought or received standing to seek relief against Livaditis in Count VI. The Supreme Court in *Flast v. Cohen*, 392 U.S. 83, 98 (1942), in an opinion by Chief Justice Warren, held that:

> "Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on federal court power by the concept of standing. The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."

Following *Flast* in *Winpisinger v. Watson*, 86 F.R.D. 77, 78 (D.C. 1980), Judge Green held:

> "A plaintiff, in order to invoke the authority of the federal court, must allege a "distinct and palpable injury to himself," *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975), which must be direct and concrete, not abstract, remote or speculative. *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 675 (1974)."

The question of standing is fundamental to a party's right to petition the courts for redress. Article III of the Constitution requires that an actual case or controversy exist between the parties before a dispute between them may be adjudicated by an Article III court. *Flast v. Cohen*, *supra*, at 78, *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, Mo.*, 300 U.S. 227, *rehearing denied*, 300 U.S. 687 (1939); *In re Summers*, 325 U.S. 561, *rehearing denied*, 326 U.S. 807 (1945). In the lower courts, plaintiffs chose not to seek standing to claim relief against Livaditis in Count VI. Since the count does not name Livaditis and no evidence from the record has been provided by the plaintiffs and no judgment naming Livaditis exists, in essence, no controversy exists between Livaditis and the plaintiffs.

SUMMARY

The Plaintiffs relied entirely on their contention that Rule 15(b) would serve to actually or constructively amend pleadings to encompass issues not previously pled but allegedly proved in a case that has been previously tried. At a threshold matter, the Plaintiffs needed to specifically cite facts and authority that distinguishes the case at bar from *Klaprott*, *supra*, and *Atlantic and Gulf Stevedores*, *supra*, and releases them of the obligation imposed by the Federal Rules of Civil Procedure. No such citation to authority or the record was made by Plaintiffs. The Plaintiffs also needed to establish when the need for this relief first came to their attention and what action they took.

In fact, the plaintiffs did not seek to conform the pleadings to an issue allegedly proved, but not pled, but rather, they attempted to amend the verdict and the judgment to include a party defendant not charged in the count,

nor named in the verdict returned, nor in the judgment entered on that verdict, and in the process, they and the lower courts violated Livaditis' right to a jury trial. Plaintiffs cited no authority for that proposition later, but argued that an additional party defendant could be later incorporated into a pleading from which he was purposefully excluded. The cases cited by Plaintiffs in the lower courts discussed legal *issues* that were raised and proved, not *parties* who were excluded in a particular pleading. The cause of action asserted in Count VI was not new to this case; it was pled and tried before the jury. What Plaintiffs sought to do was not to amend the pleadings, but rather to amend the judgment. The Plaintiff's proposed jury instructions carefully described and delineated the three defendants for the counts other than Count VI. In Count VI, the Plaintiff chose to charge only the corporate defendants as having potential liability. The form of verdict erroneously purports to make it possible to assess liability against the individual by naming him as a possible choice for an adverse verdict. However, the jury chose a form of verdict that was fully consistent with the count that they were required to decide on and was further fully consistent with the instructions that they had received. The Court entered a judgment on the jury's verdict that was likewise fully consistent with the jury's verdict.

Plaintiffs do not speak to the effect of any of the Federal Rules of Civil Procedure relating to altering or amending verdicts or judgments, nor do they address the Seventh Amendment or the question of their failure to establish standing as to Livaditis in Count VI, but rather attempt to use Rule 15(b) to transform an issue into a party. There is no support for Plaintiffs' position in the cases cited or in the record as referred to by them. Finally, Plaintiffs' view of the effect of the ambiguous jury verdict on Count

VI is inconsistent with Livaditis' Seventh Amendment Right to a jury trial.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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